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6 **BEFORE THE SUPREME COURT OF**
7 **THE STATE OF ARIZONA**

8 In the Matter of

Supreme Court No. R-07-0028

9 PETITION TO AMEND ER 1.5 OF
10 THE ARIZONA RULES OF
PROFESSIONAL CONDUCT

**Comments of the State Bar of
Arizona Regarding Petition to
Amend ER 1.5 of the Arizona Rules
of Professional Conduct**

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12 The State Bar of Arizona, pursuant to Rule 28, Ariz.R.Sup.Ct., hereby files
13 its comments to the Rule 28 Petition to Amend Rule 42, Ariz.R.Sup.Ct.,
14 specifically ER 1.5, filed on December 21, 2007. The State Bar of Arizona does
15 not support the proposed amendment for the following reasons: case law already
16 addresses the intent of the proposed amendment; the proposed amendment is
17 vague; and the proposed amendment, if adopted, is narrow. Further explanation
18 in support of this comment is set forth below.
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1 **I. The Supreme Court Rules and Case Law Already Address This Issue**

2 The proposed amendment to ER 1.5 would prohibit the lawyer from
3 entering into an arrangement for, charge or collect a contingent fee without
4 simultaneously advising the client, in writing, that the contracted fee percentage
5 may be reduced at the conclusion of the representation and that the reduction is
6 subject to the requirements of ER 1.5(a).

7 The Rules of Professional Conduct provide that a lawyer shall not enter
8 into an agreement for, charge, or collect an unreasonable fee. Rule 42,
9 Ariz.R.Sup.Ct., specifically ER 1.5(a). Thus charging an unreasonable fee is
10 already expressly prohibited by the rule.

11 Furthermore, Arizona case law already requires that at the conclusion of
12 the representation, a lawyer must perform a review to consider the reasonableness
13 of his fee. If the fee that appeared reasonable at the outset of the representation
14 has become excessive, the lawyer cannot stand upon the contract and collect the
15 fee. *In re Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984).

16 Given the lawyer's obligation to perform such a review and the further
17 prohibition against collecting an excessive fee, it seems unnecessary to require
18 written notification to the client of the lawyer's already existing obligation.
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II. The Proposed Language is Vague and Ambiguous

The proposed amendment employs language that is vague and ambiguous and subject to varied interpretation. The proposed language prohibits, “a contingent fee for representing a client in a civil case unless the client is simultaneously advised in writing that if the client’s claim settles early, easily and without litigation, the lawyer’s fee will not exceed the value of the representation pursuant to paragraph [a].” ER 1.5(a)(1-8) outlines the applicable factors for a determination whether a fee is reasonable. Rule 42, Ariz.R.Sup.Ct. The terms “early” and “easily” are subject to wide interpretation and would likely render the proposed amendment unenforceable.

Even if the proposed amendment is enforceable, the current rule already obligates the lawyer to consider the reasonableness of the fee and to forego collecting an unreasonable fee. The lawyer is in the best position to interpret and understand the factors to be considered when determining the reasonableness of the fee. Notification to the client in the form it is proposed could unnecessarily burden the lawyer. The proposed amendment has the potential to increase the frequency of client complaints over the ultimate fee. Having the subjective interpretation of the client as to whether he/she believes that the lawyer settled the case “early” and “easily” could create unjustified expectations on the part of the client and create a tremendous burden on the lawyer to defend and justify a fee.

1 The client may believe that a legitimate fee dispute exists based on his/her
2 interpretation of “early” and “easily” while having little or no understanding of
3 the factors set out in ER 1.5 as well as the application of those factors in the
4 lawyer’s consideration of the reasonableness of his fee.

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6 **III. If Adopted, the Proposal is Too Narrow**

7 If it is deemed necessary that at the outset of the representation the lawyer
8 must provide written notice to the client of the possible reduction of a fee at the
9 conclusion of the representation, then it is problematic that the proposed
10 amendment excludes the same notice if the fee is not a contingent fee. *In re*
11 *Swartz* applies to all types of fee arrangements as does the requirements of ER
12 1.5.¹ *Id.* at 273, 1243. The proposed amendment would therefore not be broad
13 enough to cover all instances where a lawyer would be required to notify a client
14 of the obligation to not collect an unreasonable or excessive fee.

15 To ensure however, that lawyers understand their ongoing obligation to
16 consider at the conclusion of the representation the reasonableness of their fee,
17 the Comments to ER 1.5 should include a discussion of *In re Swartz*. However, a
18 separate petition would be necessary to request its inclusion in the Comments.

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¹ *Swartz* involved a personal-injury matter but the Court’s opinion broadly discussed the
reasonableness of lawyer fees without limiting the discussion to a particular type of legal
matter.

1 **IV. Conclusion**

2 The State Bar of Arizona respectfully requests that the Court deny the
3 petitioner's proposed amendment to ER 1.5 or in the alternative address the
4 ambiguity created by the proposed amendment.

5 **RESPECTFULLY SUBMITTED** this 6th day of May, 2008.

7 **STATE BAR OF ARIZONA**

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9 
10 Robert B. Van Wyck
11 Chief Bar Counsel
12 State Bar of Arizona

13 Electronic copy filed with the
14 Clerk of the Supreme Court of Arizona
15 this 6th day of May, 2008.

16 by: Kathleen A. Lundgren